

Amendment for Land Use Covenants
Department Reference Number: R-2006-04
Proposed Regulations

Amend title 22, division 4.5, chapter 39, section 67391.1 to read:

§ 67391.1. Requirements for Land Use Covenants.

(a) Except as provided in subsections (e)(2) and (f) of this section, a land use covenant imposing appropriate limitations on land use shall be executed and recorded when:

(1) Facility closure, corrective action, remedial or removal action, or other response actions are undertaken pursuant to ~~chapter 6.5, 6.8, or 6.85 of division 20 of the Health and Safety Code, or article 1 of chapter 1, part 10.5 of the Education Code~~; and

(2) Hazardous materials, hazardous wastes or constituents, or hazardous substances will remain at the property at levels which are not suitable for unrestricted use of the land.

(b) The Department shall not approve or concur in a response action decision document which includes limitations on land use or other institutional controls, unless the limitations or controls are clearly set forth and defined in the response action decision document. Except as provided in subsections (e)(2) and (f) of this section, any response action decision document shall (1) specify that the limitations or controls will be incorporated into an appropriate land use covenant as required by this section and (2) include an a description of the implementation and enforcement plan provisions, including but not limited to frequency of inspections and reporting requirements, necessary to ensure the integrity and long-term protectiveness of the land use covenant. The Department shall provide public notice of the response action decision document in a manner that meets the requirements of Health and Safety Code section 25356.1(e)(2) or section 25398.6(i). ~~DTSC~~ The Department will consult with local agencies, including local reuse authorities, as appropriate.

(c) Except as provided in subsections (e)(2) and (f) of this section,

(1) The Department shall not certify that a response action has been satisfactorily completed, with the exception of any necessary long-term operation and maintenance activities, until such land use covenants required by this section have been signed and recorded in the county where the property is located, or

(2) The Department shall not acknowledge final certification of closure of a hazardous waste disposal unit until such land use covenants required by this section also meet the requirements of sections 66264.119 or 66265.119 as applicable.

(d) All land use covenants pursuant to this section shall be executed by the Department and the landowner and shall be recorded in the county where the land is located. All land use covenants shall run with the land pursuant to Civil Code section 1471 and/or Health and Safety Code sections 25202.5, 25222.1, 25355.5, 25395.99 or 25398.7 and 25396(f) and shall continue in perpetuity unless modified or terminated in accordance with applicable law.

(e) Federal Property.

(1) The Department shall not consider property owned by the federal government to be suitable for transfer to nonfederal entities pursuant to 42 United States Code section 9620(h)3-4 where hazardous materials, hazardous wastes or constituents, or hazardous substances remain at the property at levels which are not suitable for unrestricted use of the land, unless an appropriate land use covenant, except as provided in subsection (e)(2), will be executed by the Department and the federal government or the successor-in-interest to the federal government during the initial property transfer process, and recorded in the county where the land is located in accordance with this section.

(2) Whenever the Department determines that it is not feasible to record a land use covenant for property owned by the federal government, such as transfers from one federal agency to another, the Department and federal government ~~may~~ shall use other mechanisms to ensure that future land use will be compatible with the levels of hazardous materials, hazardous wastes or constituents, or hazardous substances which remain on the property. Examples include: ~~A~~ amendments to the federal government facility master plan, physical monuments, or agreements between the federal government facility and the Department.

(f) Whenever the Department determines that it is not feasible to establish a land use covenant as a component of a remedy for a site, it may use other institutional control mechanisms to ensure that future land use will be compatible with the levels of hazardous materials, hazardous wastes or constituents, or hazardous substances which remain on the property.

(1) Examples include, but are not limited to, publicly owned tidelands trust property: such mechanisms may include, ~~but are not limited to~~ physical monuments, or a memorandum of agreement or consent agreement between the Department and the trustee for the tideland trust property.

(2) If the Department subsequently determines that it is feasible to record land use covenants for such sites, the Department shall ensure that the land use covenants are recorded in accordance with (d).

(g) Modification and Termination. The Department may modify or terminate land

use covenants if it determines such modification or termination is protective of public health and safety and the environment.

(h) The Department shall require responsible parties, facility owners or operators, or project proponents involved in land use covenants to pay all costs associated with the administration of such controls.

(i) For purposes of this section:

(1) "Department" means the Department of Toxic Substances Control.

(2) "Federal property" means that property found in the Federal Property and Administrative Services Act of 1949, as amended, 40 United States Code sections 471 et seq.

(3) "Land use covenants" include easements, servitudes, covenants and restrictions which run with the land and restrict uses to protect public health and safety and the environment.

(4) "Response action decision document" means a remedial action plan, removal action workplan, record of decision, closure plan, documents written pursuant to a corrective action order or corrective action consent agreement, or other similar documents which formally select an action to be taken in response to the release or threatened release of hazardous materials, hazardous wastes or constituents, or hazardous substances.

(5) "Unrestricted use of the land" means that the land may be used for any purpose.

Note: Authority cited: Sections 25351.5 and 25150, Health and Safety Code.
Reference: Sections 25202.5, 25222.1, 25223, 25355.5, 25395.99, 25398.6 and 25398.7, Health and Safety Code.